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In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-1856

HUMBOLDT PLACER MINING COMPANY,

Petitioner,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Humboldt Placer Mining Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 6, 1977.

OPINION BELOW

The opinion of the Court of Appeals, reported at 549 F2d 622, appears in the Appendix A-2. The District Court for the Eastern District of California rendered no opinion. The Court dismissed review of administrative action by summary judgment.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 6, 1977. A timely petition for rehearing en banc was denied on March 28, 1977. This petition for certiorari was filed within 90 days after that date.

This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

(1) Whether the district court should have entered summary judgment without an opinion stating the basis for its judgment on judicial review of administrative action as to whether sufficient evidence did or did not exist to support the agency decision, essential for appellate review.

(2) Whether the whole record, including agency findings of fact in favor of mining claimant, should have been scrutinized by the district court and substantiality of evidence judged by whatever in the record fairly detracts from evidence claimed to support agency action.

STATUTES AND RULES

Administrative Procedure Act, 5 USC 706.

"Sec. 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed, and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(d) without observance of procedure required by law

(e) unsupported by subtantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393."

STATEMENT OF THE CASE

Humboldt Placer Mining Company organized in 1896, was the owner of the thirteen contested placer mining claims in Trinity County, California, for over 70 years.

The United States took possession of the claims by Writ of Possession in 1957, for the purpose of constructing Trinity Dam and Reservoir.

In 1960, the Department of the Interior through the Bureau of Land Management, filed a complaint to contest validity of the claims in Sacramento 10-747.

The United States Court of Appeals enjoined prosecution of the contest, Best v. Humboldt, 293 F2d 553 (CA 9, 1961). The Supreme Court reversed, 371 U.S. 334 (1963).

In 1966, the Bureau filed a Second Amended Complaint in Contest 10-747. The charge:

> "a) There is not disclosed within the boundaries of the mining claims mineral material of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery."

Other charges were made which are not at issue here. There is no dispute that the claims are mineral in character.

The contest was tried in November, 1967 and January, 1968. In June, 1970, the Hearing Examiner[1] held the claims null and void. He ruled upon each of Humboldt's requested findings of fact. He adopted 37 specific findings of fact favorable to Humboldt.[2] He denied the remainder of Humboldt's requested findings.[3]

---

1 The United States Civil Service Commission has changed the title "Hearing Examiner" to "Administrative Law Judge"... 27 F.R. 16787, Aug. 17, 1972.

2 Findings adopted were Nos. 1,5,6,7,10,12,13, 14,17,19,23,25,30,49,51,53,58,65,66,67,68,70, 71,76,79,81,83,86,87,88,90,92,93,96,98,100, 101. A-91

3 Findings rejected were Nos. 2,3,4,8,9,11,15 16, 18,20,21,22,24,26,27,28,29,31,32,33,34, 35,36, 37,38,39,40,41,42,43,44,45,46,47,48, 50,54,55, 56,57,59,60,61,62,63,64,69,72,73, 74,75,77,78, 80,82,84,85,89,91,94,95,97,99, 102,103,104,105, 106,107,108. A-91

NOTE: There were two requested findings designated as No. 73, both rejected. We have labeled the second No. 73(a).

The Interior Board of Land Appeals adopted as its own the Examiner's rulings on each of the proposed findings of fact submitted by Humboldt. It affirmed the Hearing Examiner's decision December 1972.

When Humboldt sought judicial review, the district court was called upon to examine the facts in the administrative record and determine under 5 USC Sec. 706 (2)(E) whether the administrative ruling was or was not supported by substantial evidence.

On June 12, 1974, the United States District Court for the Eastern District of California entered summary judgment for the Secretary in Civil No. S-2755. The court made no discussion of the case in any opinion. A-9.

The district court did not make any finding of facts or express its opinion as to what it considered to be substantial evidence supporting the agency's determination. Thus, there was no basis for appellate review of the district court's decision by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other courts of appeals as to the proper interpretation of 5 USC Sec. 706 governing scope of judicial review of agency action.

The tenth circuit has ruled that "where the determination under 5 U.S.C.

Sec. 706(2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence' and where this is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment'" Nickol v. United States, 501 F2d 1389 (1974) (upheld on petition for rehearing en banc).

In Heber Valley Milk Company v. Butz, 503 F2d 96, 97 (10th Cir. 1974), the Honorable Thomas C. Clark, Associate Justice Retired, sat by designation with Hill and McWilliams, Circuit Judges. The court said:

> "In Nickol, we held that summary judgment is inappropriate in a judicial review under the Administrative Procedure Act of 1946 of an order and decision of an administrative agency when the issue to be decided is whether the administrative order is supported by substantial evidence, and there is substantial controversy as to the material facts. We indicated in Nickol that it is the duty of the trial court to examine the record as made before the administrative agency, and then to 'find', and to identify, the 'facts' which it deems to be supportive of the agency's order, if such be the trial court's resolution of the matter. The trial judge in Nickol in his judgment and order stated that he had examined the record as made before the administrative agency and that he had 'concluded' that there was evidence to support the agency's decision. But in Nickol we held that such was not enough, and

that the trial court must itself make 'a finding of fact or facts as to what is the substantial evidence which supports the agency determination...(and that)(t)he appellate court cannot properly review the district court's action without such findings."

In Hill v. Morton, 525 F2d 327 (10th Cir. 1975), the court said:

"In a two-sentence 'Judgment' the district court indicated 'consideration' of the briefs filed by the parties and the administrative record, concluded that the action of the Secretary was arbitrary and capricious and ordered the Secretary to pay plaintiff's claim in full. The government now appeals."

* * * *

"Here, the district court concluded only that the agency action was arbitrary and capricious, but offered neither an explanation of the manner in which the conclusion was reached nor a statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.

With basis for the district court's disposition of the matter obscure, proper appellate practice is precluded. Therefore, the judgment appealed from must be vacated and

the matter remanded for further proceedings consistent with the principles announced in Nickol and Heber Valley."

The decision here of the Court of Appeals for the Ninth Circuit affirming the district court's summary judgment in a case for judicial review, conflicts with Nickol, Heber Valley and Hill above.

The Nickol court recognized conflict with decisions of the Court of Appeals for the Ninth Circuit and said, 501 F2d 1389, p. 1390:

"One court has characterized a 'judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence' as 'only a question of law' and therefore 'subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.). See also Beane v. Richardson, 457 F2d 758 (9th Cir.); White v. Udall, 404 F2d 334 (9th Cir.); Henrikson v. Udall, 350 F2d 949 (9th Cir.); Todaro v. Pederson, 205 F.Supp. 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (6th Cir.); 6 Moore's Federal Practice p. 56.17(3) at 2472-73 (1974).

"The very purpose however of such judicial review of agency action is to examine the facts in the record. Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484. Thus, it would

seem that the prerequisites for a summary judgment under Fed. R. Civ. P. 56 are absent in a review of the administrative record under the circumstances before us." 501 F2d at 1390.

* * * *

"...Thus, we hold that where the determination under 5 U.S.C. Sec. 706(2)(E), and the issue of whether or not the determination is 'unsupported by substantial evidence', and where there is 'substantial controversy' as to the 'material facts', the district court is precluded from entering a Fed. R. Civ. P. 56 type of 'summary judgment'."

The Court of Appeals for the Ninth Circuit said:

> "...a bald conclusion by the trial judge (that sufficient evidence does or does not exist to support the Secretary's decision that there had or had not been a sufficient discovery) is of no aid to this Court in making its own decision that such sufficient evidence exists, and that the district judge relied upon it." Multiple Use, Inc. v. Rodgers C. B. Morton, 504 F2d 448 (1974).

The Supreme Court said in Universal Camera that a reviewing court should set aside an agency decision when it cannot

find that the evidence supporting that decision is substantial, when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view. 340 U.S. at 488. The Supreme Court (Mr. Justice Frankfurter) stressed that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. p. 490.

The Third Circuit followed Universal Camera and exercised "the conventional judicial function" and concluded that the finding of the Federal Security Administrator establishing a standard of identity for salad dressing was not supported by substantial evidence when the record was considered as a whole. Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (1951).

The Fourth Circuit followed Universal Camera in Litton Dental Products, Etc. v. N.L.R.B., 543 F2d 1085, 1087 (Nov. 3, 1976). It concluded that the Board's decision and order were entirely lacking in the substantial support in the evidence that is indispensable to Board action.

The Fifth Circuit discussed the appropriate standard of review in Mueller Brass Co. v. N.L.R.B., 544 F2d 815 (1977) and noted that if, after a full review of the record the court was unable to conclude that the evidence supporting the Board's determinations is substantial, it should deny enforcement.

(Citing N.L.R.B. v. Mueller Brass Co., 509 F2d 704, 707 (5th Cir 1975; N.L.R.B. v. O.A. Fuller Super Markets, Inc., 374 F2d 197, 200 (5th Cir. 1967). The Court reversed the Board's decision as not supported by substantial evidence. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, the Supreme Court reversed the Sixth Circuit's decision, which affirmed a district court's summary judgment in favor of the Secretary of Transportation's administrative determination, 309 F. Supp. 1189 (W.D. Tenn) 432 F2d 1307 (6th Cir). The Court remanded the case to the district court for "plenary review" of the administrative decision, allowing the court in its discretion, to remand the cause to the appropriate agency and official for further proceedings if necessary.

The Secretary said at page 13 of his brief to the Court of Appeals for the Ninth Circuit:

> "We cannot and do not, dispute the fact that the district court did not indicate the evidence upon which it relied in concluding that the Secretary was entitled to judgment as a matter of law... and as such, is technically in conflict with this Court's decision in Multiple Use, Inc. v. Morton, 504 F2d 448 (1974) and Nickol v. United States, et al, 501 F2d 1389 (CA 10, 1974)."

While the Supreme Court expressed reluctance to intervene in Court of Appeals decisions as to whether on the

record as a whole there is substantial evidence to support agency findings, it will do so when the standard appears to have been misapprehended or misapplied. 340 U.S. 474 at 490-491. Universal Camera Corp.

ARGUMENT

The Administrative Procedure Act (5 USC Sec. 706) provides for scope of review: "The reviewing court shall" determine whether agency action is "unsupported by substantial evidence" (subsection 3) and "the court shall review the whole record, or such portions thereof as may be cited by any party".

The Senate and House committees explained: "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Senate Doc. No. 248, 79th Cong. 2d Sess. 214, 280 (1946).

The Supreme Court made clear in Universal Camera that it takes literally both the words of the statute and the words of the committee reports (340 U.S. 474). The Administrative Procedure Act applies to contests conducted by the Department of the Interior. U.S. v. Heirs of Stack, A-28157 (1960).

Senator Hruska, of the Senate Judiciary Committee, former Chairman of the Committee on Administrative Practice and Procedure, made clear that Congress intended that the courts should review

administrative decisions critically. He said in the February 19, 1974 Congressional Record - Senate S 1911, 1912, that

> "The way the Administrative Procedure Act is meant to be carried out, the administrative law judges are expected to make specific findings as to the evidentiary facts in each case they hear and to frame their ultimate conclusions accordingly. If the case is brought up for judicial review, the reviewing court is not intended to dispose of the case merely by looking for some evidence in the record to support the decision below. The reviewing court should consider whether or not each of the rulings on evidentiary fact is supported by substantial evidence. The courts should not adopt uncritically findings of ultimate fact made below simply because they are labeled 'findings', when they are really conclusions.
>
> The reason why it is essential for the judge who hears the evidence to make specific findings of evidentiary fact was pointed out in Saginaw Broadcasting Co. against the Federal Communications Commission. Judge Stephens came right out with the statement that —
>
> The requirement of findings [illegible] far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered to facts and law. This is fully as important in respect to commissions as it is in respect of courts.

> "When the trial judge bases his conclusions upon specific evidentiary findings, these furnish to a reviewing court the foundation upon which to base an intelligent review of the decision. And the reviewing court should not shrink from the sometimes laborious task of examining the record to evaluate the findings made below. The Administrative Procedure Act, section 706 of title 5 of the United States Code, makes it the duty of the reviewing court to review the whole record, or such portions thereof as may be cited by any party, and to take due account of the rule of prejudicial error.
>
> If the reviewing court will take the trouble to make the critical examination of the administrative record which Congress intended when writing the Administrative Procedure Act, the court should be able to detect instances where bureaucratic policy has been allowed to override the facts which support the citizen's rights. Citizens must look to the courts to protect their constitutional rights and give them meaning. Unless the courts will stand out against instances of bureaucratic injustice, the Constitution becomes only a scrap of paper.
>
> Our form of government must necessarily make use of administrative agencies, and the course of history has shown many times and in many countries that the inevitable tendency of agencies is to reach out for increasing power, to expand the scope

of their authority and the number of their personnel until what President Franklin Roosevelt called the fourth branch of government becomes truly a bureaucracy. And, more recently the Senator from Arizona, Senator Goldwater, expressed similar concern about the bureaucracies. Power alters the perspective of the persons who wield it, and particularly where agencies administer large areas of public resources, there is a tendency to create and enlarge a Federal empire which is inside the 50 States, but really independent of them.

The temptation to consolidate that empire by dispossessing citizens of property rights lawfully acquired under acts of Congress is a strong one. To a zealous bureaucrat the project may look a righteous crusade, while the citizen screams 'Confiscation'. The task of preserving our kind of country, one where a citizen's constitutional rights are a reality, so that it will not turn into a bureaucracy where those rights have no meaning, calls for the courts to check and correct administrative abuse of power."

Review of the whole record would include contradictory findings of the Board. It would include contradictory evidence. All evidence which weakens or indisputably destroys the bald conclusion that the contested claims offered no prospect of being developed into a paying mine at the time they were taken by writ of possession in 1957 must be considered.

Contradictory agency findings indisputably destroy bald conclusions to the contrary. For example, the agency found that the gold content of the Weaverville formation averaged .276 cents per cubic yard. Four slope wash samples averaged out 1.863 cents per cubic yard. The average value of nine gully samples was 2.56 cents per cubic yard. The average value of thirteen samples of recent stream gravels was .872 cents per cubic yard.

Yet the agency also found that samples from the Jackson claim ranged from a low of 31.2 cents to 48.2 cents per cubic yard in gold and on the Furnell claim the samples ranged from 16.2 cents to 101.0 cents per cubic yard in gold. Agency finding No. 66. A-116, A-117.

The agency found that "sand and gravel on the claims is a source of concrete aggregate." Finding No. 6 A-97. In its opinion, the Board concluded that the gravel was "too dirty and too soft to make concrete aggregate." 8 IBLA 411, A-16.

In computing the low lithologic averages, agency engineers took into account low sample values on surrounding claims which were no part of the contested ground, e.g., from Tannery No. 3, Exhibit K, Tr 91, 98; from the Mistake, Potter, Curless, and Dyke, Summary of Samples S, Tr 144.

And in computing the low lithologic averages, the Bureau of Land Management engineers did not take into account the

high values in such claims. For example, they ignored the values reported by Mr. Frenzell, mining engineer for the Bureau of Reclamation, 1955, Exhibit E p. 36, Tr 339. Mr. Frenzell concluded "That a discovery of mineral has been found upon the north-half southeast quarter, southwest quarter, section 7, township 34 North, range 8 west, which would warrant a prudent man to spend time and money for the development of the claim." See Exhibit B for extent of lithologic units.

Samples for gold were taken from the contested claims:

Furnell Placer Claim: The Board found that nine samples ranged from 16 cents to $1.01 per cubic yard. The arithmetic average was 45.76 cents per cubic yard. Finding No. 66. A-116 to A-117.

Jackson Placer Claim: The Board found that eleven samples ranged from 22 cents to 48 cents per cubic yard. Finding No. 58. A-112.

Cademartori Placer Claim: The Board found three samples which averaged 7.08 cents per cubic yard. Agency finding No. 68. A-117 to A-118.

Tannery No. 2 Placer Claim: Fourteen samples taken on this claim, ranged from 12 cents to 37 cents per cubic yard with arithmetic average of 22.05 cents per cubic yard, Ex. F, 10,11, 19,33. Requested Finding No. 57, A-111.

Enough Placer Claim: Evans, Harris, Erich and Middleton took eight samples ranging from seventeen cents to ninety cents per cubic yard with arithmetic average of 39.66 cents per cubic yard. Ex M. Requested Finding No. 61, A-114.

Lewis Placer Claim: Evans, Harris, Middleton and Erich took one sample which assayed 14.48 cents per cubic yard in gold. Ex N p. 9; Ex B; Tr 120. Requested Finding No. 62. A-115.

Last Chance Placer Claim: Seven samples were taken by York, Johnson and Little for Humboldt. They ranged from 22 cents a yard to $12.80 per yard. The arithmetic average was $4.68 per cubic yard. Ex 8, 10, 11, Requested Finding No. 59. A-113.

Tannery Placer Claim: Six samples taken by Hubbard, Yost and Gibson for Humboldt ranged from 12 cents to $4.31 per cubic yard. The arithmetic average was $1.21 per cubic yard. Ex 8, 10, 11, Requested Finding No. 60. A-113 to A-114.

Humboldt Placer Claim: Two samples taken by Cumley and Gibson averaged $2.04 per cubic yard. Ex 24,16, Requested Finding No. 63. A-115.

Covelo Placer Claim: Two samples taken by Gibson averaged $8.28 per cubic yard. Ex 16, IV, Requested Finding No. 64.

Faurell Placer Claim: We have not found any evidence of the Government's

having examined this claim. The agency did not establish a prima facie case as to this claim.

White Placer Claim: Three samples were taken by Evans and Middleton, which were reported to be below one cent per yard. Finding No. 65. We question the validity of the samples taken on this claim as well as on the other claims where low values were reported. Agency Finding 65. A-116.

Ukiah Placer Claim: Two samples taken by Evans and Erich averaged 4.5 cents per cubic yard. Agency Finding 67.

Mr. Middleton, for the agency, testified costs of mining gold at the La Grange Mine were as low as three or four cents per yard. (Tr 332). The LaGrange Mine was shut down in 1942 by WBP Order L 208.

John D. Hubbard, mining engineer for Humboldt, said in 1952 that "A very conservative cost estimate of operations would be seven cents per yard," for hydraulic mining. Water was available in 1952. (Ex 10,)

Therefore, the sample values found above seven cents per yard could have been mined profitably in 1954 prior to taking in 1957.

Water was available to Humboldt for hydraulic mining prior to the taking and

writ of possession in 1957. Ex 10, Tr 784. Mr. Evans, engineer for the Bureau of Land Management, testified in 1967 that the Humboldt placers were a large, low grade potential for profit, where there are actually millions of cubic yards. "Prior to the time the lake was put in--this was really important--there was water available." Tr 265.

Mr. Evans said at the present time (eleven years after the taking) a prudent man would not mine the ground for gold, Tr 180. He did not say a prudent man would not develop the ground for gold. Mr. Evans agrees that the claims may be regarded as worthy of investigation for gold by capitalists interested in dredging and hydraulic mining. Tr 208. He did not question that large bodies of lower grade gold-bearing gravel remain to be mined. Tr 206. He agrees that the outlook for future placer gold mining in the area is good. Tr 207. Mr. Evans testified that the Weaverville alluvials present a large low-grade gold potential, millions of cubic yards. Tr 265.

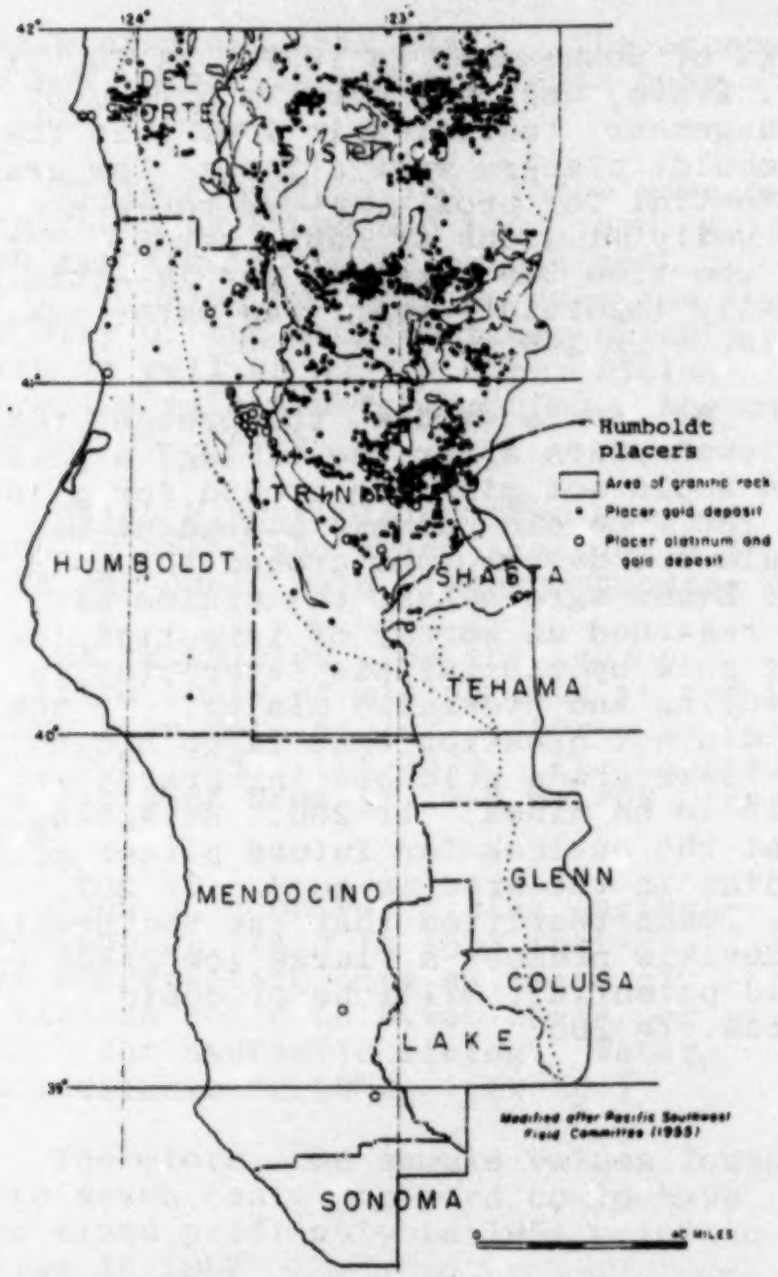

Figure 9. Map of northwestern California showing location of placer deposits of gold and platinum.

Geologic Reconnaissance of the Northern Coast Ranges and Klamath Mountains, California. California Division of Mines Bulletin 179 1960

Humboldt's gravel deposits met all of the requirements of discovery under the criteria recognized by the United States Department of the Interior August 1, 1955, Chapter 5.1 Mineral Character Determinations, Part 5 Investigations and Reports, Volume VI Minerals. We have shown adequate quantity. Where the criteria call for 5,000 cubic yards we have shown 10,000 cubic yards for each sub-division of each claim.

The Board adopted questested finding No. 1, demand for gravel (A-96), No. 5, quantity of gravel (A-97), No. 6, quality of the gravel (A-97), No. 7, extent of the washed gravel south of Stuart's Fork on the contested claims (A-97-98), No. 10, existence of a local market for 100,000 to 150,000 tons of gravel per year (A-98), No. 12, continuity of local market for gravel since 1850 in Trinity County (A-99), No. 14, only one competitor for local market (A-99), Nos 17 and 76, good accessibility (A-100, 121), No. 19, the extent of market study made by James R. Miller, Commodity expert (A-101), No. 79, yardsticks for measuring mineral demand (A-121), No. 81, scarcity of gravel (A-122).

Although the government engineers testified that there are 10,000 cubic yards of fine, washed gravel on each ten-acre subdivision of each contested claim, (Tr 623, 646, Erich; Tr 250, Evans; Tr 344, Middleton), Humboldt's requested finding No. 48 was rejected. (A-108).

Mr. Evans testified that loose gravel could be handled for about 25 cents per

ton. (Tr 274).

When Mr. Erich was shown contracts between Bleak Brothers Sand and Rock and Peter Kiewitt & Son, an order for 35,000 tons of coarse aggregate $2.90 per ton, and an order for 18,000 tons fine aggregate for concrete pavement $2.90 per ton f.o.b. carrier site, Mr. Erich testified that local people will pay a higher price but if the material is processed and crushed, the average price was $1.80 to $1.90 per ton. (Tr 617).

There is a suitable profit spread between handling and processing costs and the sales price. (Tr 719, Miller)

There are diggings on the contested claims where rock had been taken off the claims for gravel. Stuart's Fork is a big mass of gravel. It is washed and can be used very easily. (Tr 621, Erich) Yet, requested findings Nos. 82, A-122 and No. 2, A-96 were rejected.

The Act of July 23, 1955, 30 USC 611 had no application to locations for valuable minerals made previously as here.

A landmark case of the Department, Layman et al v. Ellis, 52 L.D. 714 (1929) states at page 718:

> 'Data are presented contained in publications of the Geological Survey, entitled 'Mineral Resources of the United States,' as evidence of the marked increase in production, use, and price of this commodity since

> 1909, when the decision in the Zimmerman case was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States, 23,382,904 tons of gravel of all kinds of the value of $5,719,886, of which amount California produced 914,035 tons, valued at $169,476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at $51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of $1,177,086 (1927, Part 2, p. 160-181.)
>
> The commissioner's statement also appears to be correct that 'according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909.' The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth of the size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition (is) developing controversies

and discussions as to zone and commodity freight rates. (1925, Mineral Resources, Part I, p. 47). In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful minerals (U.S.Geological Survey Bulletins Nos. 585, 910) and mineral supplies (U.S. Geological Survey Bulletin No. 666).

'From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts."

CONCLUSION

Therefore, there was a substantial controversy about the facts, shown by the administrative record. This precludes entry of a Rule 56 F.R.C.P. summary judgment.

The ultimate conclusion was not supported by the basic facts. Apparent from the record, the district court made no review, or at least made no findings as to the substantiality of the evidence, necessary for appellate review.

The Court of Appeals should have remanded the case for findings on the substantiality of the evidence, if any, to support the ultimate bald conclusion.

We pray that this Honorable Court issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

June 22, 1977.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 25 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-1856

HUMBOLDT PLACER MINING COMPANY,

Petitioner,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME I A-1 to A-63

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMBOLDT PLACER MINING COMPANY, a corporation, and DEL DE ROSIER. Plaintiffs-Appellants,	) Filed) Mar. 28,) 1977
vs.	) No. 74-
SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA. Defendant-Appellee.	) 2762) ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, and JAMESON, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Hufstedler has voted to reject the suggestion for rehearing in banc and Judges Merrill and Jameson have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUMBOLDT PLACER MINING COMPANY, a corporation, and DEL DE ROSIER,
Plaintiffs-Appellants,
vs.
SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 74-2762

OPINION

[January 6, 1977]

On Appeal from the United States District Court
for the Eastern District of California

Before: MERRILL and HUFSTEDLER, Circuit Judges, and JAMESON,* District Judge

MERRILL, Circuit Judge:

At issue are appellants' rights to compensation for the seizure by the United States of appellants' interests in certain unpatented placer mining claims, located on Stuart's Fork of the Trinity River in Trinity County, California. On June 27, 1957, the United States commenced a condemnation action in the District Court for the Northern District of California to secure title to these claims and other property for use in connection with the construction of Trinity Dam and Reservoir. Later, on March 17, 1960, the Secretary of the Interior commenced administrative proceedings to contest the validity of the claims. The jurisdictional propriety of these proceedings was challenged but ultimately upheld. *Best v. Humboldt Mining Co.*, 371 U.S. 334 (1963). In this action appellants seek judicial review of those proceedings.

*Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

Appellants' claims were all located more than fifty years ago, but applications for patents were not made until 1954. The discovery originally claimed was of gold, assertedly embedded in the gravel of what is known as the Weaverville Formation on Stuart's Fork. The appellants' claims are northeast of the LaGrange mine, which is on the same Weaverville Formation and for many years was operated with apparent success.

Before a hearing examiner of the Bureau of Land Management, appellants asserted that the claims had value not only as a gold placer but also as a gravel deposit. Under the Act of July 23, 1955, 30 U.S.C. §611, deposits of "common varieties" of gravel are declared not to be valuable mineral deposits within the meaning of the mining laws. Thus the facts present four dates having varying points of relevance: that of the patent application in 1954, that of the effective date of the common varieties act in 1955, that of the taking of the claims by the United States in 1957 and that of the filing of contest by the United States in 1960. Arguments can be advanced in support of any one of them as the critical date for ascertainment of either gold or gravel value. We resist the temptation to resolve the question. Instead, we assume for the purposes of this case that if value existed on any one date, it existed on all.

The hearing examiner held that value was lacking both as to gold and as to gravel. His decision was upheld by the Interior Board of Land Appeals (IBLA). *United States v. Humboldt Placer Mining Co.*, 8 I.B.L.A. 407 (1972). Appellants then sought judicial review and revereal of the IBLA decision. The district court granted summary judgment in favor of the Secretary and this appeal followed. We affirm.

Gold

In support of its contest the United States conducted a comprehensive exploration program on the claims between 1957 and 1961.[1] Four mining engineers and geologists testified before the

[1]The hearing examiner said of this program:
"Auger holes, churn drill holes, surface channels, pits and trenches were excavated and tested as points which Humboldt in its application for mineral patent has indicated the existence of significant values and which the Contestant's engineers deemed worthy of examination."

hearing examiner that as a result of this exploration program they had formed the opinion that on none of the claims had there been a valid discovery of gold of value sufficient to meet the prudent-man test. *See United States v. Coleman,* 390 U.S. 599, 602 (1968), citing the standards set in *Castle v. Womble,* 19 L.D. 455, 457 (1894): "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine."

In support of their claim of gold value, appellants submitted various reports. The hearing examiner acted well within his discretion as a finder of fact in discounting these reports. Some of them were business records of the appellants, written prior to 1942. While they reflected some significant gold values, they were very general. The appellants also submitted a report by Merrill Yost which included some drill logs and contained evidence of high gold values. This evidence, however, was refuted by the appellee's sampling conducted in the immediate vicinity of Yost's excavations and drill holes. Moreover, Yost did not testify and subject himself to cross-examination to support his report, although he was apparently available. In weighing the evidence, the hearing examiner could reasonably have found the appellants' reports to be unpersuasive.

Much of appellants' case was based on the fact that the claims were on the Weaverville Formation, the value of which had been established by the success of the LaGrange mine. Discovery must, however, be made on the claims themselves. The LaGrange proximity might indeed persuade a reasonable prospector to continue to search for valuable minerals, but he must succeed in his search before discovery occurs. *Henault Mining Co. v. Tysk,* 419 F.2d 766 (9th Cir.), *cert. denied,* 398 U.S. 750 (1970). The reasonably prudent man we are concerned with is the miner who has made his discovery and not the prospector who is still looking.

Appellants also rely on testimony by Florian Gibson, a geologist, that the claims had high value placer gold deposits. As to this testimony the hearing examiner stated:

> "The fantastic gold values reported by Gibson were based on surface samples taken over a five hour period, as contrasted with the extensive exploration program conducted by the Contestant involving several man-years. The samples were assayed by the so-called Douglas process involving the use of unidentified solutions. There is no supporting evidence of the nature of the unidentified solutions or positive evidence of the process by which the gold could be recovered. Gold values averaging one hundred dollars per cubic yard, consisting of either coarse or microscopic particles, would surely be identifiable by normal fire assay. The Douglas tests reflecting average gold values of one hundred dollars per cubic yard, and as high as two hundred dollars gold per cubic yard of material in place, are simply unworthy of belief."

Appellants criticized the exploratory work of the government as not extensive enough to establish a lack of value. They assert that the government drill holes should have been extended down to bedrock, where gold is most likely to lodge. Appellants, however, mistake the burden of proof in these cases. The burden of the United States in contesting validity is to make out a prima facie case of lack of value. The burden then shifts to the claimant to show, by a preponderance of evidence, that the claim is valid. *United States v. Springer,* 491 F.2d 239, 242 (9th Cir.), *cert. denied,* 419 U.S. 834 (1974); *United States v. Zweifel,* 508 F.2d 1150, 1157 (10th Cir.), *cert. denied,* 423 U.S. 829, *reh. denied,* 423 U.S. 1008 (1975). The United States here undoubtedly had established a prima facie case. If anyone had the burden of going to bedrock it was appellants in order to rebut the case made by the government.

The hearing examiner concluded that the United States had made out its prima facie case of lack of value and that appellants had not met the burden of overcoming that case. IBLA, in review, agreed that "the preponderance of credible evidence fails to support a discovery on any of the claims." We agree.

Gravel

As to appellants' contention that the claims had value for the gravel deposit, the hearing examiner stated:

> "A considerable portion of the Contestees' evidence was devoted to the contention that valuable deposits of sand and

gravel occur in the claims. Substantial deposits of material suitable for fill and sub-base in highway construction and more limited deposits of recent stream gravels suitable for use as concrete aggregate do occur on the claims. However, these deposits do not constitute valuable mineral deposits unless they are shown to be marketable. There is not a shred of evidence in the record that there has ever been any demand for the subject sand and gravel deposits, or that any portion thereof has ever been removed from the claims for use in concrete aggregate or for any other purposes. The fact that there is a very limited annual market in small towns in Northern California which have other existing sources of supply, and the possibility of the future construction of highways and dams in the area, do not constitute evidence of a demand for these particular deposits. In the absence of more specific evidence that these particular sand and gravel deposits could have been removed and disposed of at a profit on or before July 23, 1955, it must be concluded that the same do not constitute valuable mineral deposits within the meaning of the mining laws."

IBLA echoed his findings:

"While the record discloses that gravel was an abundant commodity on the claims, there is no evidence of any sales of gravel from the deposits. George W. Nielsen, a mining engineer employed by the Bureau of Land Management and called by appellee, testified that at no time has the Weaverville Formation been mined and processed for the production of sand and gravel. He further testified that the Weavcrville Formation, because of weathering, is generally too dirty and too soft to make concrete aggregate, although it could be used for sub-base and fill material. Robert Middleton, a mining engineer called by appellee, testified that he examined the claims, and further testified that no aggregate had been produced from the claims, and that there was no evidence on the ground of any removal.

This evidence was sufficient to establish a prima facie case that the gravel on the claims could not have been marketed at a profit prior to July 23, 1955. • • •

• • • •

Appellants, in our view, failed to overcome the prima facie case established by the Government. Their evidence was too vague and inconclusive to establish that locatable gravels from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955. Moreover, appellants have failed to establish by substantial and probative evidence the existence of a demand for the gravel as of that date *from these claims. United States v. William A. McCall, Sr., et al.*, 2 IBLA 64, 78 I.D. 71 (1971)."

8 I.B.L.A. 411-12.

Appellants, citing *Verrue v. United States*, 457 F.2d 1202, 1204 (9th Cir. 1972), argue that lack of sales of gravel from the claims figures unduly in the findings of the hearing examiner and IBLA to the effect that marketability of the material had not been established. In *Verrue* we held that "positive evidence in the record of marketability" was not offset by evidence of the lack of sales of material and the availability of comparable material from other sources.[2] *Verrue* does not apply here. Here there was no positive evidence of marketability to to overcome the government's prima facie case. Further the determination of IBLA that the government had made out a prima facie case of lack of discovery was supported by testimony disparaging the quality of the gravel on the claims.

Appellants protest that the decision of IBLA respecting quality of the gravel is flatly contrary to a finding proposed by appellants and adopted by the Board. That finding reads:

"Finding No. 6. Sand and gravel on the claims is a source of concrete aggregate. (Tr. 499, Scarfe). The gravels are a source of impervious material of good quality, which can be used commercially for construction and road purposes. (Tr. 499)."

---

[2]In *Mellusso v. Morton*, 534 F.2d 860, 863 (9th Cir. 1976), we construed *Verrue* as "holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusive proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidance of marketability."

The first record citation is apparently an error. The second has reference to the following testimony of government witness, George Scarfe, on cross-examination:

> "Q Now, do you agree with this statement that: 'Sand and gravel deposits along the Trinity River and Stuart's Fork are being considered as sources for concrete aggregate for the Trinity and Lewiston Dams and tunnel lining, while gravels which occur upon land contained in the above Placer Mining locations are being considered as the sources to the required impervious embankment material for the Fairview Dam.'
>
> Do you agree with this statement that the material on these claims among which are those that you examined are suitable for this particular purpose?
>
> A They said they are being considered. I agree, well, I have no reason to disagree. I hadn't seen this report."

Finding No. 6 is to read as a paraphrase of this testimony; it is the only construction supported by the record. So construed we do not find it to conflict with the Board's decision. *See Ideal Basic Industries, Inc. v. Morton*, No. 74-2298 at 5-8 (9th Cir. Sep. 28, 1976).

Judgment affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-13-77—410

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HUMBOLDT PLACER MINING COMPANY, a corporation, and DEL DE ROSIER. Plaintiffs, v. SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA, Defendant

Civil S-2755

SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment having been submitted to the Court on August 30, 1973, and the Court having considered the pleadings in the action, defendant's Memorandum of Points and Authorities, dated May 22, 1973, Plaintiff Humboldt's Motion for Summary Judgment in Response to Defendant's Motion, filed August 13, 1973, Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Response to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, filed August 28, 1973, and the certified administrative record, and having found that there is no genuine issue as to any material fact, and having concluded that defendant is entitled to judgment as a matter of law, it is hereby

ORDERED, that defendant's Motion for Summary Judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' Complaint in the above entitled action be and hereby is dismissed with

prejudice.
Dated: [June 12, 1974]

/s/ Philip P. Wilkins
UNITED STATES DISTRICT JUDGE

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard, Arlington VA
22203

UNITED STATES
v.
HUMBOLDT PLACER MINING COMPANY
and
DEL DE ROSIER

IBLA 70-205 Decided December 20, 1972

Appeal from decision (California Contest 10-474) of the Office of Appeals and Hearings, Bureau of Land Management, holding mining claims null and void.

Affirmed.

Mining Claims: Discovery: Marketability--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Placer Claims

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development. proximinty to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date.

Mining Claims: Discovery: Marketability
The Government may raise a presumption that the material on mining claims could not be extracted and marketed at a profit by introducing evidence that the claimant has done nothing to develop the claim.

Mining Claims: Contests--Mining Claims: Discovery: Generally
Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.
8 IBLA 407

Rules of Practice: Appeals: Burden of Proof--Contests and Protests: Generally
Where the Government has made a prima facie showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral desposit sufficient to support a discovery is upon claimant.

Rules of Practice: Evidence
The weight and creditibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for the appellants;

Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California; Burton J. Stanley, Esq. Office of the Solicitor, Department of the Interior, Sacramento, California.

OPINION BY MR. FISHMAN

The Humboldt Placer Mining Company and Del de Rosier have appealed from a decision dated June 9, 1970, rendered by the Office of Appeals and Hearings, Bureau of Land Management, hereinafter termed the "Bureau decision." That decision affirmed a decision of a Hearing Examiner 1/ dated March 6, 1969. which declared the placer mining claims in issue null and void for lack of a discovery of a valuable mineral deposit on any of the claims.

The Humboldt Placer Mining Company is a corporation which was organized in 1896. All of its mining claims in issue were located prior to 1920. On November 19, 1954, Humboldt filed a patent application for the claims in issue. On June 27, 1957, the United States commenced an action in the District Court to condemn certain property which included the land embraced within the claims in order to construct the Trinity River Dam and Reservoir. After obtaining a writ of possession in the District Court, the United States, on

1/ The United States Civil Service Commission has changed the title "Hearing Examiner" to "Administrative Law Judge." 37 F. R. 16787 (August 17, 1972). Hereinafter that official will be referred to as "Judge".

May 15, 1958, instituted a contest proceeding in the local Land Office of the Bureau seeking an administrative determination of the validity of the unpatented mining claims. Humboldt thereupon brought suit to enjoin the administrative proceedings, contending that the proper jurisdiction to determine the validity of the claims was in the courts. The issue of jurisdiction was ultimately decided by the United States Supreme Court in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963), in which it was held that the issue of the validity of the claims was to be resolved by the Department of Interior. In the interim, contestees prosecuted an appeal to the Secretary of the Interior from a decision rejecting their answer to an amended complaint, and denying their motion to dismiss the complaint. The Secretary reinstated the contest proceedings by decision United States v. Humboldt Placer Mining Company and Del De Rosier, A-30055 (Supp.) (December 16, 1964).

The contestant, the United States, filed a second amended complaint on July 20, 1966, alleging in part as follows:

a. There is not disclosed within the boundaries of the mining claims mineral materials of a variety subto the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

b. The land embraced within the claim or claims is nonmineral in character.

c. With respect to the public lands in each and all of the mining claims identified in Paragraph III of this

Second Amended Complaint, contestant charges separately and collectively that each 10-acre legal subdivision or part thereof is nonmineral in character and therefore should be excluded from the respective alleged mining claims.

d. The Cademartori placer claim, as described in the location notice, embraces incontiguous tracts of land, and is therefore contrary to law.

Contestees answered the second amended complaint generally denying the allegations contained therein. A hearing was held on November 28, 29, 30, and December 1, 1967, and on January 8 and 9, 1968. All parties were represented by counsel at the hearing.

The contested claims are located on the south side of Stuart Fork of the Trinity River, in Trinity County, California, upstream from the recently constructed Trinity Dam. The most significant geological characteristic in the area is the Weaverville Formation with a reported depth where greatest of over 800 feet. It is an old tertiary river channel which has been bisected by streams and has been preserved by the relative uplifting of the older hard and resistant sediments around it. The tertiary gravels are unconsolidated, deeply weathered, red-colored clay gravels resulting from volcanic activity and reworking, and which are estimated to be approximately 35 million years old. The claims also expose some recent and present stream gravel, and some ultramafic and granitic intrusive

rocks. The bedrock series in the area are the Bragdon Formation (Mississippian), Copley Greenstone (Devonian), and Salmon Schist.

The principal issue on this appeal is whether the evidence presented at the hearing established a discovery of a valuable mineral deposit on any of the claims within the meaning of 30 U.S.C. §22 (1970). Appellants assert that the evidence supports such a discovery with respect to both gold and gravel on each claim.

A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine ***." Castle v. Womble, 19 L. D. 455, 457 (1894); see United States v. Coleman, 390 U.S. 599 (1968).

In applying this rule to the present case, we are of the opinion that the preponderance of the credible evidence fails to support a discovery on any of the claims. Six qualified geologists and engineers testified for appellee. None was called by appellants, and only one geologist testified on behalf of Archibald, a party permitted to intervene in the hearing.2/

2/ J. O. Archibald was allowed to intervene at the hearing and assert an interest in some of the claims under a lease agreement. However, he did not appeal and is no longer a party to the proceedings

The assay methods used for the geologist called by Archibald were not explained.

GRAVEL

Common varieties of sand and gravel were withdrawn from location under the mining laws on July 23, 1955. See 30 U. S.C. §611 (1970). Consequently, to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. United States v. Coleman, supra; Foster v. Seaton, 271 F2d 836 (D.C. Cir. 1959); Barrows v. Hickel, 447 F2d 80 (9th Cir. 1971); United States v. Isbell Construction Co., 4 IBLA 205, 79 I.D. 385 (1971).

While the record discloses that gravel was an abundant commodity on the claims (Tr. 250, 344, 957), there is no evidence of any sales of gravel from the deposits. George W. Nielsen, a mining engineer employed by the Bureau of Land Management and called by appellee, testified that at no time has the Weaverville Formation been mined and processed for the production of sand and gravel. (Tr 960). He further testified that the Weaverville Formation, because of weathering, is generally too dirty and too soft to make concrete aggregate, although it oculd be used for subbase and fill material (Tr 961). Robert Middleton, a mining engineer called by appellee, testified that he examined the

claims (Tr 292), and further testified that no aggregate has been produced from the claims, and that there was no evidence on the ground of any removal. (Tr 354).

This evidence was sufficient to establish a prima facie case that the gravel on the claims could not have been marketed at a profit prior to July 23, 1955. As stated in United States v. E. A. Barrows and Ester Barrows, 76 I.D. 299, 306 (1969):

> ***[W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. (Citing cases)

Where, as in the present case, the Government has made a prima facie showing of a lack of a discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimants. Foster v. Seaton, supra; United States v. Wayne Winters d/b/a Piedras Del Sol Mining Company, 2 IBLA 329, 78 I.D. 193 (1971).

In an attempt to meet this burden, appellants called James R. Miller, a marketing consultant, to testify. He expressed an opinion that gravel could have been mined from the claims and removed and disposed of at a profit prior to July 23, 1955 (Tr 721). However, there is no evidence in the record that Miller was in the Trinity County Area in or prior to 1955; nor was his testimony

based upon personal knowledge. Cf. Verrue v. United States, 457 F2d 1202)9th Cir. 1972). He admitted that he did not examine the sand and gravel on the claims (Tr. 693, 734) and it is apparent from the record that his opinion was based upon conversations with other persons who were not called upon to testify (Tr 694, 735) and literature which he studied on the market potential of sand and gravel generally in the State of California and the United States. Moreover, Miller qualified his opinion by conditioning it on the ability to commercially produce gold (Tr. 719, 721), and stated that he was "not prepared to say whether the amount of gold that's been evidenced would be a commercial operation" (Tr 721).

In expressing his opinion, Miller failed to articulate whether he was referring to gravels of the type which can only be used for fill and similar uses, or whether he was referring to gravels of the type which could be used to make concrete aggregate. The distinction is crucial. In determining the marketability of materials on a mining claim, sand and gravel which can only be used for fill purposes or for other comparable purposes cannot be considered since such materials have never been locatable under the mining laws. See United States v. E. A. Barrows and Esther Barrows, supra, and cases cited therein.

Appellants, in our view, failed to overcome the prima facie case established by the Government. Their evidence was too vague and inconclusive to establish that locatable gravels from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955. Moreover, appellants have failed to establish

by substantial and probative evidence the existence of a demand for the gravel as of that date from these claims. United States v. William A. McCall, Sr., et al., 2 IBLA 64, 78 I.D. 71 (1971).

GOLD

Mining engineers and geologists conducted on behalf of the contestant, a comprehensive mineral examination on the claims from 1957 to 1961. Samples were taken in accordance with accepted standard procedures by excavating churn drill holes, auger holes, surface channels, pits and trenches. The samples were taken at points selected by contestant's engineers and at points which contestees had indicated in their patent application the existence of significant mineral values. The samples were assayed in accordance with accepted standard procedures. The record discloses the following data with respect to each claim :

Ukiah Placer Mining Claim

Three of seven channel and trench samples taken from this claim contained no gold values. (Contestant's Exhibit Q). The remaining four samples contained gold values ranging from .076 to 5.65 cents per cubic yard. An auger hole drilled to a depth of 25 feet revealed gold values of .142 cents per cubic yard.

Covelo Placer Mining Claim

Three of nine channel and trench samples taken from this claim revealed no gold values (Contestant's Exhibit F). The remaining six samples contained gold values ranging from .192 to 1.40 cents per cubic yard. An auger hole 25 feet in depth revealed gold values of.045 cents per cubic yard.

Humboldt Placer Mining Claim

Three channel samples were taken from this claim. Two of the samples contained no gold (Contestant's Exhibit O). The third channel sample contained gold values of .549 cents per cubic yard. An auger hole drilled to a depth of 46 feet revealed gold values of .071 cents per cubic yard. The auger hole was put down on a depositional contact of the Weaverville Formation on the Bragdon.

White Placer Mining Claim

Three channel samples taken from present stream gravels on this claim contained gold values rangaing from .107 to .688 cents per cubic yard (Contestant's Exhibit R). Two auger holes, drilled to depths of 17 and 57 feet, revealed respective gold values of .049 and .095 cents per cubic yard.

Tannery Placer Mining Claim

The contestant took four samples from this claim. (Contestant's Exhibit J.) A channel sample taken from the exposed Weaverville Formation contained .576 cents gold per cubic yard. An auger hole, 21.8 feet deep, revealed no gold values. Two churn drill holes, each 45 feet deep, revealed gold values of1.13 cents and .157 cents per cubic yard.

Furnell Placer Mining Claim

Five of the sixteen samples taken from this claim contained no gold. Six samples ranged from .3 to 1.1 cents per cubic yard. A sample from a channel cut on a slope along a road had a value of 8.3 cents per cubic yard. Four sample shafts were put down in recent gravels along Slate Creek which runs northeasterly through the claim. A sample from a shaft 2.8 feet ot bedrock in sec. 3

showed a cubic yard value of 17.4 cents. In sec. 2, a shaft showed the following values per cubic yard: the top 3.2 feet, 1.4 cents; the next 4.7 feet, 42.8 cents; and the last foot in cemented Weaverville bedrock, 2.1 cents. In a third shaft the values per cubic yard were: the first 6 feet, 0.5 cents; the next 1.2 feet 49 cents; and th last foot in cemented bedrock, 2.1 cents. The sample from the fourth test shaft went down 3.4 feet through to cemented bedrock and had a value of 67 cents per cubic yard. (Contestant's Exhibits D-D, E-E).

Last Chance Placer Mining Claim

The contestant took 21 samples from this claim (Contestant's Exhibit L), eight surface samples, twelve from churn drill holes ranging from 36 to 100 feet in depth, and one from an auger hole 42 feet in depth. the surface samples contained gold values ranging from .224 to 3.30 cents per cubic yard. The churn drill holes and auger hole revealed gold values ranging from .034 to 1.22 cents per cubic yard. Drill hole number 6 located between Humboldt holes numbers 13 and 14, drill hole number 7 located on the other side of Humboldt hole number 13, and drill hole number 8 located on the other side of Humboldt hole number 14, revealed gold values rangaing from 0 to .156 cents per cubic yard. In each instance, holes were put down within five feet of the Humboldt hole.

Lewis Placer Mining Claim

Twelve channel samples taken from this claim contained gold values ranging from .02 to 14.48 cents per cubic yard (Contestant's Exhibit N). The sample showing the highest value and the second sample con-

taining 6.21 cents gold per cubic yard were taken from limited occurrences of present stream gravels. A sample of the present Suart Fork gravels contained gold values of 1.21 cents per cubic yard.

Enough Placer Mining Claim

Eighteen surface samples taken from this claim contained gold values ranging from .052 to 90.58 cents per cubic yard. (Contestant's Exhibit M). The gold values shown in nine of those samples was 1.64 cents, or less, per cubic yard. Sample number 8-1 is composed of nine samples taken from recent gravel, gully bottom. The nine samples contained gold values ranging from 6.71 cents to 90.58 cents per cubic yard, with an average value of 33.93 cents per cutic yard. According to the exhibit, "It would be a physical impossibility to have more than 1,200 cubic yards at this value in this gully. The gully is mined out from this point downstream." An auger hole 47 feet deep revealed gold values of .362 cents per cubic yard.

Faurell Placer Mining Claim

The Faurell claim enbraces two incontiguous tracts. Two channel samples taken from the east tract contained gold values of 1.04 cents and 1.56 cents per cubic yard. There was no evidence of prospecting on the west tract. Three channel samples cut from exposures on the west tract contained no significant gold values. (Contestant's Exhibit U). The concentrates of a number of samples were submitted for fire assay (Contestant's Exhibit G). The sample showing the greatest value, $683.20 per ton of concentrate, had a 15,900 to 1 ratio of con-

centration. The value of the black sand concentrate reflected the similar inconsequential values when related back to the value of the black sand per cubic yard of gravel and clay.

Tannery No. 2 Placer Mining Claim

Twenty-five channel and trench samples, taken from present and recent stream gravels, contained gold values ranging from .132 cents to 22.82 cents per cubic yard (Contestant's Exhibit F). A churn drill hole, 35 feet in depth, revealed gold values of 4.26 cents per cubic yard. Two auger holes, 24 and 25 feet in depth, revealed respective gold values of .076 and .308 cents per cubic yard.

Jackson Placer Mining Claim

Eight samples taken from this claim showed gold values ranging from 0.5 to 34.8 cents per cubic yard. The next highest value was 8.5 cents per cubic yard. The highest value cmae from a test shaft put down by the mineral examiner in recent gravels of Slate Creek (Contestant's Exhibit D-D, E-E).

Cademartori Placer Mining Claim

The claim embraced two incontiguous tracts. One of the tracts was abandoned by contestees at the hearing. In the retained portion of the claim three samples have been taken. A channel cut in an eight-foot bank of weathered Weaverville Formation contained gold values of .8 cents per cubic yard. A pit sample from a gully in Irish Gulch revealed gold values of 1.2 cents per cubic yard. A channel sample along an old ditch showed nil. (Contestant"s Exhibits D-D, E-E, Tr 460-461 and 470-471).

The average gold values on the undisturbed Weaverville Formation which was exposed on the claims was .276 cents per cubic yard. The material exposed in the slopes and washes had an average gold value of 1.863 cents per cubic yard. The gully samples averaged 2.56 cents per cubic yard, and the recent stream gravels averaged 8.72 cents per cubic yard.

The mining engineers and geologists called by contestant testified to the effect that as a result of their examinations of the claims, they were of the opinion that none could be developed as valuable mines (Evans, Tr 177; Middleton, Tr. 310; Scarfe, Gr. 478-480; Erich, Tr. 595, 640).

Inlight of this evidence, we conclude that the contestant established a prima facie case that no discovery existed on any of the claims. After a careful consideration of the record, we are of the opinion that the contestees have failed to meet their risk of non-persuasion in establishing by a preponderance of evidence that the claims are valid. Cf. Foster v. Seaton, supra; United States v. Neil Stewart, 5 IBLA 39, 79 I.D. 27 (1972).

Appellants have raised eighteen contentions of error in their brief on appeal. The principal claims of error raised by appellants have been considered above. The remaining claims of error, which largely relate to alleged procedural irregularities or criticism of the Government's case in chief, will be considered in their order of appearance in appellants' brief.

I.

Appellants first argue that the second amended complaint is defective because

it fails to allege the critical date when a discovery must be made and it fails to allege a lack of market for gravel. It should be noted that appellants made no objection with respect to this issue prior to or at the hearing.

The law is well settled that discovery must be shown to have been made at the latest as of the time a claim is challenged. United States v. Margherita Logomarcini, 60 I.D. 371 (1949). Contestees were well aware of the law in this regard. See Best v. Humboldt Placer Mining Company, supra. It is also well settled that in order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel it must be shown that prior to July 23, 1955, the materials could have been extracted, removed and marketed at a profit. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit. United States v. Neil Stewart, supra. Inherent in the language of the second amended complaint is the charge that there had been no discovery of valuable minerals subject to location. The presentation of their case was in no way prejudiced by the failure of the second amended complaint to allege the critical date.

Contestees' position that the complaint should be dismissed for failing to allege a lack of market for gravel is untenable. In support of their position they rely upon an instruction in the Bureau of Land

Management Manual.3/ It provides in relevant part as follows:

> 1. Marketability of common place minerals.
>
> .23. For claims located before July 23, 1955, for common place minerals where no actual market exists, the proper charges are:
>
> (2) no discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for those materials.

Manual instructions which are issued for administrative purposes only, are neither published nor binding upon the public, and ordinarily, no one other than Bureau employeess is expected to use the Manual . Barbara Rubenstein, A-28508 (December 28, 1960). Moreover, a charge of lack of discovery encompasses within its ambit a lack of a market for the mineral.

The record discloses that the patent applications did not specifically state that location was for gravel, and while it is not essential to identify each specific mineral claimed to be valuable in a patent application, the failure to mention gravel or any other common place materials in the patent application would account for the absence of an allegation regarding the lack of discovery by July 23, 1955, and the corollary market for gravel in the instant case. In any event,

3/ Bureau of Land Management Manual, Vol. VI, Part 5, Chapter 5.2 (August 1, 1958).

it is apparent from the record that both parties directed their proof to the issue of marketability in connection with gravel. The first witness called by contestees was called as an expert to express an opinion on the marketability of gravel. Contestant also called an expert witness to rebut the evidence regarding the marketability of gravel put on by the contestees.

Contestees, we conclude, were reasonably apprised of the issues in controversy and there is no showing that they were misled in any respect. Under such circumstances the notice provided by the complaint is adequate. See United States v. Independent Quick Silver Co., 72 I.D. 367 (1965), and authorities cited there.

II

Contestees next argue that the complaint should be dismissed because contestant failed to comply with an order for the production of documents. While contestees did not raise this argument in their appeal to the Bureau, they did claim at the hearing that contestant had not fully complied with the order.

The same Judge who issued the order for the production of documents ruled that contestant substantially complied with the order, and we perceive no error in this ruling. The record discloses that counsel for contestees was given ample opportunity to inspect documents which he claimed were not produced (Tr.22). It is also apparent from the record that some of the information contained in documents which contestees claim were not produced was turned over to counsel for contestees in what is referred to as the "Frenzell Report" (Tr 19). Other documents not produced did not relate to the mineral examination made by the contest-

ant (Tr. 19020). Upon a review of the record we are of the opinion that those documents which were not produced prior to the hearing were not necessary to the preparation of contestees' case, and under such circumstances, failure to produce does not constitute error. See Mrs. R. W. Hooper, 3 IBLA 330 (1971).

III

Contestees next argue that the Director's decision cannot stand because the record fails to show that the Director ruled on each assignment of error and failed to adopt each requested finding presented. In support of their petition, contestees rely on the Administrative Procedure Act §8; 5 U.S.C.§557 (1970). Section 557(c) provides an opportunity for parties to submit proposed findings and conclusions for consideration before an initial decision is made. The record clearly shows that this provision of the Act was complied with in every respect. The Judge ruled on each requested finding. He adopted 38 of those findings and rejected the remainder stating his reasons therefor in each instance. It is implicit in the decision of the Bureau that it agreed with the Judge with respect to his findings and conclusions, at least insofar as they were material and relevant to decising the ultimate issues in the case.

The assignments of error made by contestees on appeal from the decision of the Judge related, almost entirely, to asserted errors committed by the Judge in making the findings and conclusions in the case, or failing to make certain findings or conclusions requested by contestees.

While the Bureau decision did not consider each assignment of error separately, it

gave adequate consideration to the exceptions presented. The Act does not require detailed or numbered findings on every subsidiary evidentiary fact. See NLRB v. Sharples Chemicals, Inc., 209 F2d 645 (6th Cir. 1954). Furthermore, a separate finding need not be made on exception to a Judge's report. See 2 K. Davis, ADMINISTRATIVE LAW TREATISE §16.02 at 438 (1958); cf. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 352 (1969).

IV.

Contestees next argue that the ultimate finding of nondiscovery with respect to the mining claims is erroneous because it is not supported by evidentiary facts. Contestees cite several cases in support of the proposition that evidentiary facts are necessary to prove ultimate facts (a proposition with which no one takes issue) but refer to no evidentiary facts in the record to support an ultimate conclusion of discovery. We are of the opinion that the ultimate fact of nondiscovery is amply supported by the evidence, with respect to each claim.

V.

Contestees next argue that it is error to require more than one discovery to be made in order to support an association placer claim. They cite several cases in support of the proposition that only one discovery is required to support the validity of an association placer claim, again a proposition with which no one takes issue. In answer to the alleged error, we only point out that no requirement beyond the showing of "a discovery" with respect to each of the association claims was imposed on the contestees.

VI.

Contestees next argue that the Government's gold placer samples were invalid because the samples were not taken to the bedrock. We disagree.

Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. United States v. Jimmie (Juanita) P. Laing, 3 IBLA 108 (1971); See United States v. Lawrence W. Stevens, et al.,76 I.D. 56 (1969); United States v. Coaton, A-30835 (February 23, 1968); United States v. Bryan Gold, A-30990 (May 7, 1969); United States v. George C. Johnson, et al., A-30606 (October 25, 1966).

In the instant case the samples taken by the Government were as deep or deeper than those of the contestees')Tr.221-223), and several samples taken by the Government did in fact reach bedrock. See Contestant's Exhibits F. I, M, N, O, T, Q, R, and E-e. In any event, while a person might predict that greater values of gold would be found at bedrock, such a prediciton does not establish a "discovery" in the absence of a showing of the physical existence of such mineralization. See Henault Mining Company v. Tysk, 419 F2d 766 (9th Cir. 1969) cert. denied, 398 U.S. 950 (1970); United States v. Wayne Winters dba Piedras Del Sol Mining Co., supra.

VII.

Contestees next argue that certain gold asays of the Government's samples were not made in accordance with standard procedures and were, therefore, invalid. In support of this argument the contestees point out that several samples were panned and run through a rocker or sluice box by James Bassham, a man with no scientific background, rather than by the Government mining engineers.

Counsel for contestees had no objection to the admission of assay reports introduced by the Government (Exhibit G, Tr 160). Government mining engineers in several instances personally performed the procedures in question (Tr. 250, 470). While Bassham may not have had formal scientific training, the record reflects that eh was a professional panner (Tr 251) and there is no evidence to indicate he lacked the requisite experience and knowledge necessary to perform the work in question, or that he was incompetent in any respect.

Contestees also claim that the assaying methods used by the Government did not recover all of the gold from the sample. However, the record shows that the recovery of gold in the sampling methods used by the Government were at least as accurate as any possible placer mining method. (Tr. 507, 515). We conclude, therefore, that the gold assays of the Government samples were valid.

VIII.

Contestees next claim that several of the Government samples on Tannery No. 2 were invalid. They assert that the evaluation of certain of these samples was erroneous because the samples did not reach bedrock.

Those samples which did not reach bedrock were valid for reasons previously stated.

Contestees also assert that the evaluation of the samples was erroneous because overburden was included in the material sampled. However, as noted in the Bureau decision:

> It is standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, and in taking samples by churn or auger drilling to include the overburden in arriving at the mineral values for the cost of removal including the removal of the overburden is a factor in determining whether a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. Robert W. Carnes, A-28178 (May 23, 1960).

IX.

Contestees next argue that it was error to judge a gold discovery by computing gold values averaged down by lithologic units.

The only evidence in the record which makes any reference to lithologic units appears in the testimony of Robert K. Evans, a geological engineer called by the Government. On direct examination he was asked whether he had reached any conclusions concerning the mineral valuation of the claims as a result of his examination. He stated: (Tr. 177);

> A. Yes. Consideraing them either as a separate lithologic unit, thinking in terms of mining Weaverville or mining Slate Creek, in none of those--it wouldn't warrant a man spending his time and money in the hope of developing a mine on any of them;and Tannery Gulch.
>
> Q. Either as a claim?
>
> A. Either as a claim or as a rock type unit.

The conclusion of the witness was the same whether mineral valuation was considered on the basis of lithologic units or on the basis of the mineral valuation of each separate claim. In light of this testimony we conclude that there is no merit to contestees' argument.

X.

Contestees next argue that the Judge erred in giving less evidentiary weight to the Yost report (Contestees' Exhibit 8) than he gave to the reports submitted by contestants.

The Judge in his decision stated:

> The evidence of high gold values shown in the Yost report has been refuted by the Contestant's evidence relating to the results of sampling conducted in the immediate vicinity of the excavations and drill holes put down by Yost. Since Yost was not called as a witness to support the findings related in his report, the report is accorded much less evidentiary weight than the reports and opinions of the Contestant's witnesses which were made subject to cross-examination.

We perceive no error on the part of the Judge with respect to the consideration he gave the Yost report. It is a proper function of the Judge to assess and weigh evidence in considering all of the evidence presented at a hearing. United States v. Evelyn m. Kiggins et al., A-30827 (July 12, 1968); United States v. Taylor T. Hicks, A-30780 (October 24, 1967). The fact that the report was not subject to cross-examination is certainly a legitimate factor for consideration. We disagree with contestees' reasoning that the Government waived cross-examination simply because it did not object to the admission of the report into evidence without requiring contestees to lay a foundation. Nowhere in the record does it appear that the Government stipulated as to the truth of the contents of the Yost report, and the Judge did not err, under the circumstances in this case, in giving the Yost report less evidentiary weight than he did to similar reports submitted by the Government which were made subject to cross-examination.

XI.

Contestees next argue that the Judge did not give sufficient weight to the reports of W. S. Lowden (Contestees' Exhibit 11), John D. Hubbard (Contestees' Exhibit 10), William D. Ball (Contestees' Exhibit 9), and R. G. Percy (Contestees' Exhibit 7). We disagree.

These reports contained some data favorable to contestee, but for the most part the reports failed to relate specific information to any of the claims in question. The examinations of the property which were reported in these documents

were conducted intermittently from 1901 to 1942. None of the reports purported to discuss mineral values on specific claims as of the time contestees filed their application for patent, and no evidence was presented to show whether the concitions on the property had remained unchaned from the time that the reports were prepared. See Adams v. United States, 318 F2d 861 (9th Cir. 1963); United States v. Anton M. Ozanich, 7 IBLA 144 (1972); United States v. Calla Mortensen, 7 IBLA 123 (1972).

XII.

Contestees next argue that the Judge erred in finding gold values reported by the contestee J. O. Archibald unworthy of belief. In the alternative, contestees assert that these gold values cannot be used to discredit Humboldt, which neither offered nor vouched for this evidence.

We are of the opinion that the Judge properly rejected these gold values. They were based on samples taken over a five-hour period, assayed by the "Douglas" process involving the use of two unidentified solutions, and averaged $100 per cubic yard, and as high as $200 gold per cubic yard in place. No evidence was submitted regarding the nature of the unidentified and "secret" solutions (Tr. 924-927, 945), or the process by which the reported gold could be recovered.

There is nothing in the record to compel the conclusion that the Archibald data in any way controlled the Judge's findings vis-a-vis Humboldt. The weight and credibility of evidence, in any event, are matters properly considered by the

Judge in the first instance. Cf. State Director for Utah v. Edgar Dunham, 3 IBLA 155, 78 I.D. 272 (1971). His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed. Id.

XIII 4/

XVII-XVIII

Contestees finall argue that the administrative action taken by the Department of the Interior in declaring the mining claims invalid amounts to an unlawful exercise of plenary power, and a taking of property without compensation, all in violation of the Constitution and laws of the United States.

This argument has no merit. The United States Supreme Court in Best v. Humboldt Placer Mining Co., supra, had stated that "the Department has been granted plenary authority over the administration of public land, including mineral lands***." The Court also clearly recognized that the determination of the validity of the mining claims was an issue to be resolved in administrative proceedings before the Department. We are of the opinion that this issue has b een decided in accordance with due process of law.

After due consideration we adopt as our own the Judge's rulings on each of the

4/ This relates to parts XVII and XVIII of appellants' brief. All other Roman numbers deal with identical designations in appellants' brief.

Paragraphs designated XII, XIV, XV, and XVI of appellants' brief were considered under the heading of "Gold" and "Gravel".

proposed findings of fact submitted by appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Frederick Fishman
Frederick Fishman,Member

We concur:

/s/ Douglas E. Henriques
Douglas E. Henriques, Member

/s/ Joseph W. Goss
Joseph W. Goss, Member

DECISION OF ACTING CHIEF
OFFICE OF APPEALS AND HEARINGS

Mining Claims: Discovery 3413

To constitute a valid discovery on a placer mining claim it must be shown that minerals have been found within the limits of the claim in such quality and of such quantity as to warrant a man of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; where a claim contains deposits with negligible gold values or deposits with somewhat better gold values which are very limited in quantity, there is no sufficient prospect of success to warrant expenditures to that end.

Alleged secret solutions permitting greater extraction of gold from low-value deposits, of which no evidence was introduced by the mining claimants showing the nature of the solutions or that they have been actually used in mining operations in recovering greater values from low-grade deposits than can be done by conventional mining methods, are not sufficient to show that expenditures would be justified with the expectation of developing a paying mine, especially where no showing has been made that minerals of such quality exist in such quantities as to make a profitable operation reasonably possible.

To satisfy the requirements of discovery on placer mining claims located for sand and gravel before July 23, 1955, it must be shown that the deposits within the limits of each claim could have been extracted, removed and marketed at a profit as of that date, and where the evidence shows that the limited market in the area had been supplied from existing sources and there is no evidence that the claims were developed for sand and gravel, the claims are properly declared null and void.

United States v. Humboldt Placer Mining Co. et al., Contest No. 10-747 (Sacramento) (June 9, 1970)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

United States,	)	Contest No. 10-747
Contestant	)	(Sacramento)
v.	)	Ukiah, Covelo, Humboldt,
Humboldt Placer	)	White, Tannery, Tannery
Mining Company, a	)	No. 2, Jackson, Cademar-
corporation, and	)	tori, Furnell, Last
Del de Rosier,	)	Chance, Lewis. Enough
Contestees 1/	)	and Faurell placer mining claims, situated in secs. 5,6,and 7, T. 34 N., R. 8 W.; and secs. 1, 2 and 3, T.34 N., R. 9 W.; and secs. 34 and 35, T. 35 N., R. 9 W.; all in M.D.M., Trinity County, Calif.

Decision Affirmed

The Humboldt Placer Mining Company and Del de Rosier have appealed from a decision of a Hearing examiner dated March 6,

1/ Mr. J. O. Archibald, a sublessee of a lessee of certain of the mining claims involved, was allowed to intervene and was representated by separate counsel at the hearing. Archibald has not filed an appeal. Accordingly, whatever rights he may have had have terminated and he is no longer designated as a party to the proceeding.

1969, which declared the above-identified placer mining claims null and void for the lack of a discovery of a valuable mineral deposit on any of the claims and which rejected the mineral patent application originally filed for the claims on November 19, 1954.

The record shows that in June 1957 the United States filed a condemnation action in the United States District Court for the Northern District of California to obtain possession of and title to certain property, including the subject placer claims, required for the construction of the Trinity River Dam and Reservoir in California. Thereafter, on May 15, 1958, the State Supervisor, Bureau of Land Management, filed a contest complaint against the subject claims. The contestees contended that jurisdiction to dtermine the validity of the claims was in the courts. Ultimately this question was resolved by the United States Supreme Court which held that resort to condemnation in order to obtain possession of the mining claims did not preclude the United States, as titleholder, from initial adjudication of their validity by administrative procedures. Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963). Meanwhile, the contestees appealed to the Secretary of the Interior from a decision rejecting their answer to an amended complaint and denying their motion to dismiss the complaint. By decision of Decemb er 16, 1964, United States v. Humboldt Placer Mining Co., and Del de Rosier, A-30055 (Sipp.), the Secretary of the Interior reinstated the contest proceedings.

A second amended complaint was filed by the contestant on July 20, 1966, charging: (a) there is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery; (b) the land embraced within the claim or claims is nonmineral in character; (c) with respect to the public lands in each and all of the mining claims identified in Paragraph III of this Second Amended Complaint, contestant charges separately and collectively that each 10-acre legal subdivision or part thereof is nonmineral in character and therefore should be excluded from the respective alleged mining claims, and (d) the Cademartori placer claim, as described in the location notice, embraces incontiguous tracts of land, and is therefore contrary to law.

Contestees filed a timely answer to the second amended complaint. A hearing was held on November 28, 29, 30, and December 1, 1967, and on January 8 and 9, 1968. All parties were represented by counsel at the hearing.

The contested claims are on the south side of Stuart Fork of the Trinity River, in Trinity County, California, upstream from the recently constructed Trinity Dam. At the time of the hearing, portions of some of the claims had been inundated by water of Clair Engle Lake. The Tannery No. 2 was located in 1901, the Furnell was located in 1919, and the other eleven named placer claims were located in the 1890's. Other physical features frequently referred to are Tannery Gulch, Slate Creek, and Smith Gulch.

The geology of the area is sketched on Exhibit B in various colors. It is based upon a geological reconnaissance of the general area of the claims. The most extensive geological feature is the Weaverville formation with a reported depth where greatest of over 800 feet. It is an old Tertiary river channel which has since been bisected by streams, and has been preserved by the relative uplifting of the older hard and resistant sediments around it. The Tertiary gravels are unconsolidated, deeply weathered, red colored clay gravels resulting from volcanic activity and reworking. The claims also expose some recent and present stream gravels, and some ulta mafic and granitic intrusive rocks. The bedrock series in the area are the Bragdon formation (Mississippian), Copely Greenstone (Devonian), and Salmon Schist.

There has been exploratory activity in the area during the past 70 years directed primarily toward the recovery of gold from the Weaverville formation and more recent stream gravels. The minerals most frequently mentioned at the hearing were gold, and sand and gravel.

The have reviewed carefully the entire record made at the hearing, the Hearing Examiner's decision, and the appellants' statement of reasons for their appeal. The testimony will be summarized herein only to the extent deemed necessary.

The Hearing Examiner's summarization of the testimony pertaining to the extensive testing of the contested claims by the contestant's mineral examiners did not mention specifically the sampling that was performed on the Cademartori, Jackson

and Furnell claims. 2/ It is not to be inferred that the Hearing Examiner did not consider the testimony relating to them.

The appellants contend that the Hearing Examiner erred by failing to give reasons for rejecting their affirmative defenses, which were set forth in their answer alleging essentially (1) that the claims were taken without just compensation in violation of the Fifth Amendment of the Constitution; (2) that the contestees were denied trial by jury;

2/ Cademartori Placer Mining Claim. The claim embraced two incontiguous tracts. Contestees at the hearing abandoned one of the tracts, claiming that portion which comprises the N1/2NE1/4 sec. 3, and the NW1/4NW1/4NW1/4 Sec. 1, T. 34 N., R. 9 W., M.D.M. (Tr. 153, 316-317). In the retained portion of the claim three samples had been taken. A channel cut in an 8 foot bank of weathered Weaverville formation contained gold values of .8 cents per cubic yard. A pit sample from a gully in Irish Gulch revealed gold values of 1.2 cents per cubic yard. A channel sample along an old ditch showed nil. (Exhs. D-D and E-E, Tr. 460-461 and 470-471.)

Jackson Placer Mining Claim. Eight samples taken from this claim showed gold values ranging from 0.5 to 34.8 cents per cubic yard. The next highest value was 8.5 cents per cubic yard. The highest came from a test shaft put down by the mineral examiner in recent gravels in Slate Creek. (Exhs. D-D. E-E, Tr. 464, 465, 467-468, 470.)

(3) that the Government should be estopped as a matter of equity from denying contestees and their predecessors

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Footnote 2 continued--

Furnell Placer Mining Claim. Five of the sixteen samples taken from this claim contained no gold. Six samples ranged from .3 to 1.1 cents per cubic yard. A sample from a channel cut on a slope along a road had a value of 8.3 cents per cubic yard. Four sample shafts were put down in recent gravels along Slate Creek which runs northeasterly through the claim. A sample from a shaft 2.8 feet to bedrock in sec. 3 showed a cubic yard value of 17.4 cents. In sec. 2, a shaft showed the following values per cubic yard: the top 3.2 feet, 1.4 cents; the next 4.7 feet, 42.8 cents; and the last foot in cemented Weaverville bedrock, 2.1 cents. In a thir shaft the values per cubic yard were: the first 6 feet, 0.5 cents; the next 1.2 feet, 49 cents; and the last foot in cemented bedrock, 2.1 cents. The sample from the fourth test shaft which went down 3.4 feet through to cemented bedrock had a value of 67 cents per cubic yard. (Exhs. D-D, E-E, Tr. 457-469.)

George O. Scarfe, Jr., who examined these three claims was of the opinion that the mineralization on the Cademartori claim was of such low grade, and that there was such an insufficient quantity of gravels carrying gold on the Jackson and Furnell claims that each of the claims does not warrant any further expenditures with the hope of developing a paying mine on any of them. (Tr. 478-480.)

in interest uninterrupted and undisturbed possession of the mining claims for some 70 years; and (4) that the Department of the Interior has no right to determine that the contestees have no rights and that their rights have no value.

Although the Hearing Examiner's decision discloses these allegations no express ruling was made on them. We find, however, that the Supreme Court in Best v. Humboldt Placer Mining Co., supra, explicitly or implicitly struck down the alleged affirmative defenses when it found that the "Congress had entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. The United States, which holds legal title to the lands, plainly can prescribe the procedure which a claimant must follow to acquire rights in the public sector." The court concluded "That the institution of the [condemnation] suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for determining the validity of the mining claims, and the District Court acted properly in holding its hand until the issue of validity of the claims has been resolved by the agency entrusted by Congress with the task." Where a mining claim involved in a condemnation suit is administratively determined to be valid, thereafter the value of such claim for condemnation purposes is within the jurisdiction of the court. This is what Justice Douglas was talking about when he said that the District Court acted

properly in holding its hand, supra.

The Hearing Examiner correctly found that the testimony of the contestant's expert witnesses is based upon unusually extended and comprehensive exploratory examination conducted in accordance with accepted standard procedures and upon the assay results of the samples taken which assays were also conducted in accordance with accepted procedures. He pointed out that the testimony shows that the Weaverville formation exposed on the claims bears average gold values of .276 cents per cubic yard; that the material exposed in the slopes and washes bears average gold values of less than three cents per cubic yard; that the recent stream gravels bear average gold values of less than nine cents per cubic yard; and that the portions of the deposits of the recent stream gravels which bear greater than average gold values are extremely limited in extent. He properly found that deposits bearing such negligible gold values, or deposits with somewhat better gold values which are limited in volume, are not worthy of development since the mining costs would exceed the value of the gold which could be recovered.

The Hearing Examiner next found, and we agree, that the contestant established prima facie, that the deposits exposed on the claims do not bear sufficient mineralization to warrant development thereof, and hence do not constitute valuable mineral deposits within the meaning of the mining laws.

The Examiner pointed out that the documentary evidence submitted by Humboldt consists of the material submitted with its application for patent, including the Yost report, and other reports made prior to 1942.

The decision appealed from properly found that the evidence of high gold values shown in the Yost report has been refuted by the contestant's evidence relating to the results of sampling conducted in the immediate vicinity of the excavations and drill holes put down by Yost. Further, since Yost was not called as a witness to support the findings related to his report, the report is properly accorded less evidentiary weight than the reports and opinions of the contestant's witnesses which were made subject to cross-examination.

The Hearing Examiner noted that the other reports submitted by the contestees as business records of the Humboldt Placer Mining Company were all prepared at least twenty-five years ago. He added that these old reports, while reflecting some significant gold values, appear to be very general in nature and were made without benefit of information which resulted from the auger and churn drilling performed on the claims by Yost and the contestant's engineers in 1959. The Examiner then found, and we concur, that, since the reports and opinions of the contestant's witnesses are based on more extensive and more recent exploratory information, those reports are accorded much greater weight than the opinions and old reports submitted by the contestees.

The Hearing Examiner stated that the fantastic gold values reported by Gibson were based on surface samples taken over a five hour period, as contrasted with the extensive exploration program conducted by the contestant involving several man-years. The samples were assayed by the so-called Douglas process involving the use of unidentified solutions. He rightfully pointed out that there is no supporting evidence of the nature of the unidentified solutions or positive evidence of the process by which the gold could be recovered, and that gold values averaging one hundred dollars per cubic yard, consisting of either coarse or microscopic particles, would surely be identified by normal fire assay. It as his opinion that the Douglas tests reflecting average gold values of one hundred dollars per cubic yard, and as high as two hundred dollars in gold per cubic yard of material in place, are simply unworthy of belief.

The decision below pointed out that a considerable portion of the contestees' evidence was devoted to the contention that valuable deposits of sand and gravel occur on the claims, and properly found that substantial deposits of material suitable for fill and subbase in highway construction and more limited deposits of recent stream gravels suitable for use as concrete aggregage occur on the claims. The decision appropriately stated that these deposits do not constitute valuable mineral deposits unless they are shown to be marketable. The Hearing Examiner correctly found that there is no evidence in the record that

there has ever been any demand for the subject sand and gravel deposits, or that any portion thereof has ever been removed from the claims for use in concrete aggregate or for any other purpose. He added that the fact that there is a limited annual market in small towns in Northern California which have other existing sources of supply, and the possibility of the future construction of highways and dams in the area, do not constitute evidence of a demand for these particular deposits. He concluded, and we concur, that in the absence of more specific evidence that these particular sand and gravel deposits could have been removed and disposed of at a profit on or before July 23, 1955, it must be concluded that the same do not constitute valuable mineral deposits within the meaning of the mining laws.

The Hearing Examiner properly explained that an applicant for a mineral patent has the burden of proving a valid discovery at the time his application is filed, citing Cole v. Ralph, 252 U.S. 286 (1920); Best v. Humboldt Placer Mining Co., supra, and he found that the contestees have failed to sustain that burden. He also found, and we agree, that:

> The contestant has established by an overwhelming preponderance of the more credible evidence adduced at the hearing that valuable minerals have not been found on any of the claims of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means

with a reasonable prospect of success in developing a valuable mine.

The Examiner than concluded that no valuable mineral deposits have been exposed within the limits of any of the contested claims and declared each of them invalid. He made no ruling on the other charges.

Appellants allude to their having a possessory right. In that regard, under the mining laws one may take possession of vacant public land open to location under those laws and, after filing notice of location, retain that possession against all except the Government while he is in diligent prosecution of his efforts to discover valuable minerals therein. While he is in possession of the land, he is not regarded as a trespasser because he is on the land with the tacit consent of the Government. However, when the Government withdraws that consent, either by withdrawing the land from the operation of the mining laws or by the institution of adverse proceedings against the claim, the claimant must show that he has made a discovery of valuable mineral deposits within the limits of his claim in order to retain that posssession. United States v. Everett Foster et al., 65 I.D. 1 (1958).

Appellants maintain that the Department of Agriculture is not a proper party to this contest. The contested claims embrace public lands some of which are administered by the Department of Agriculture by reason of being situated in a national forest, and the remainder are administered by the Depart-

ment of the Interior. In these circumstances, it is proper for both departments to join in the prosecution of the contest. United States v. San Juan Exploration Co., A-30965 (March 27, 1969).

Under the mining laws of the United States, 30 U.S.C.§21 et seq.(1964), a discovery of a "valuable mineral deposit" within the limts of a mining claim is essential to its validity. The mining statutes do not specifically define a "discovery," but it has been held that one exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. * * *. Castle v. Womble,19 L.D. 455, 457 (1894); Chrisman v. Miller,197 U.S. 313, 322 (1905).

This has come to be known as the "prudent man test." Only when this test is satisfied can it be said that a discovery has been shown. The Supreme Court in Chrisman v. Miller, supra, in further describing what constitutes an adequate or valid discovery under the mining laws, quoted an earlier statement of Justice Filed that:

> The mere indication or presence of gold or silver is not sufficient***. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. 197 U.S. at 322 (Emphasis added).

It is obvious that the finding of just some mineral will not do. Further, if the quality and quantity of the mineral found would justify further exploration but not development, then the test has not been met and a discovery has not been shown. Converse v. Udall, 399 F2d 616, 620 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

When the Government contests a mining claim on public lands, it bears only the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the mining claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F2d 836 (D.C.Cir. 1959).

The courts recently have made it abundantly clear that the test of what is a "valuable mineral deposit" involves consideration of economic values. In discussing the 'prudent man test" and the phrase "valuable mineral deposits" as it appears in the mining statues, the Supreme Court said:

> Under the mining laws Congress had made public lands available to people for the purose of mining valuable mineral deposits and not for other purposes. (Footnote omitted.) The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus,

> profitability is an important consideration in applying the prudent man test***." United States v. Coleman, 390 U.S. 599, 602 (1968). (Emphasis added).

More recently the U. S. Court of Appeals for the Ninth Circuit in the Converse case, supra, a case involving gold, held that the prudent man test, complemented by the marketability test, judicially approved in Coleman, supra, is applicable to all mining claims.

It is not required of a mining claimant to prove a discovery to show that he has actually engaged in profitable mining operations or even that profitable operations are assured, but it is required that there be a showing of a prospect of profit which is sufficient to invite reasonable men to expend their means in attempting to reap that profit by extracting and marketing the mineral, as distinguished from evidence of value which will entice men to invest their money only to gain control over land and hold it in the hope or expectation that at a future date the land may be found to be valuable for the minerals which it contains. United States v. Bryan Gould, A-30990 (May 7, 1969), and case cited therein.

The present marketability test, which is a refinement of the prudent man test, requires a showing that the mineral in question can be extracted, removed and prsently marketed at a profit. This present marketability, as to materials

of widespread occurrence, can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. Foster v. Seaton, 271 F2d 836 (D.C. Cir. 1959). Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C.§611(1964), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could be extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, 398 F2d 791 (9th Cir. 1968).

The Government when it contests a mining claim undertakes only to show that the discernible evidence of mineralization is insufficinet to constitute a discovery. The Government is not obligated to provide affirmative proof either that the land embraced in a mining claim is nonmineral in character or that no discovery has been made. A Government mineral examiner is under no obligation to make such an exhaustive search of the land and test of the minerals as would normally be done by a prospector. Rather, his function is one of verifying, if possible, the claimed discovery. United States v. Frank Coston, A-30835 (February 23, 1968), and cases cited; United States v. Bryan Gould, supra.

Appellants contend that the Government's samples were not taken in accordance with accepted standards in that they were not drilled or otherwise taken down to bedrock. There is no merit to this contention. Many of the Government samples did go down to bedrock. In those instances where bedrock was not reached, the Government mineral examiners went as deep or deeper than the contestees or their lessees did in their sampling. Nothing more was required, as the purpose of the Government's examination of a mining claim is to verify what the mineral claimant has exposed. We agree that the proper procedure for a prospector or claimant in order to best evaluate his claim, is to go down to bedrock, but even that in some instances may not be economically feasible for him. In any event, we concur with the Hearing Examiner's finding in that the mining engineers and geologists who testified for the Government had comprehensively tested the claims for the purposes of verification in accordance with acceptable procedures. We add that each fulfilled his function of attempting to verify the claimed discoveries, and their testimony established a prima facie case for the Government.

It is urged by appellants that the sampling procedures of the Government were incorrect as they included the silt and topsoil and as a result the values were diluted. It is standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, and in

taking samples by churn or auger drilling to include the overburden in arriving at the mineral values for the cost of memoval including the removal of the overburden is a factor in determining whether a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. Robert W. Carnes, A-28178 (May 23, 1960). It is not unlike the adjustment of values in lode claims to a minable width in order to obtain realistic values. United States v. Jesse,W. Crawford, A-30820 (January 29, 1968). fn 4.

It is asserted that the Hearing Examiner erred in failing to condider the volume of gravel over the entire length of Tannery Gulch. This assertion is without merit. Each mining claim stands by itself with regard to the demonstration of a discovery. Tannery Gulch extends for a considerable distance in its northeast-southwest trend and is covered by many mining claims, most of which are not involved in this contest. Therefore, the Hearing Examiner properly did not consider the volume of mineral bearing gravel over the entire length of the gulch. Valuable mineral desposits must be found within the limits of each mining claim. 30 U.S.C.§23, 35 (1964). A discovery on one claim does not inure to the benefit of another. United States v. Charles H. Henrikson et al., 70 I.D. 212, 215 (1963), Aff'd Henrikson v. Udall, 229 F. Supp. 510 (D. Cal. 1964), aff'd

350 F2d 949 (9th Cir. 1965), cert. den. 380 U.S. 940 (1966).

Appellants maintain that the Hearing Examiner rejected contestees' Exhibits 7, 8, 10 and 11, the reports of Percy, Yost, Hubbard and Lowden, respectively. The Hearing Examiner did not reject them. He explained that he gave little weight to the Yost report because Yost was living at the time of the hearing in Sacramento and was not called upon to testify as to his examination and report on the claim. As to the other reports, submitted as business reports of Humboldt, prepared more than 25 years ago without benefit of the results of the more recent auger and churn drilling performed in 1959, the Examiner pointed out that since the reports and opinions of the contestant's witnesses are based upon more extensive and more recent exploratory information, they are accorded greater weight than the opinions and older reports submitted by the contestees. It is a proper function of a Hearing Examiner, the finder or trier of fact, to assess the weight of evidence in considering the whole of the evidence presented at the hearing. United States v. Evelyn M. Kiggins et al.,A-30827 (July 13, 1968), Fn. 5; United States v. Taylor T. Hicks et al, A-30780 (October 24, 1967).

Appellants aver that the Government presented no evidence concerning the Faurell claim. This averment has no merit. The Hearing Examiner's decision at page 8 refers to the fact that this

claim embraces two incontiguous tracts and sets out the results of the sampling conducted on the claim by the Government which are shown in Exhibits U and G, respectively. The testimony of Mining Engineer Middleton, who examined the claim, appears in the transcript at pages 299-304, 330, 333, 336 and 340.

Appellants take issue with the Hearing Examiner characterizing as fantastic the reported values in Gibson's samples, which were assayed by the so-called Douglas process involving the use of unidentified solutions. We note the contrast between the values reported in Gibson's samples and those in the Government's samples, which differences apparently prompted the Hearing Examiner's statement. This novel "assay" process allegedly recovers invisible gold values presumed lost by standard assaying methods. This new process is in its experimental stage as shown by Gibson's testimony and requires further refinement. There has been no comparison by the contestees using portions of the same samples to show the results obtained by the novel process and the results that could be obtained by standard fire assay. Neither has it been demonstrated that this laboratory-type extraction technology is economically feasible in a commercial operation. The cost estimates of such an operation are all hypothetical as there has never been such an operation upon which to base testimony of actual costs, and the cost of the secret solution is

based solely on hearsay. Moreover, there has been no showing that there is a sufficient quantity of material within the limits of any claim containing these alleged high invisible gold values which would support such an operation. As a consequence, the claimants have not established that the novel extraction process when applied to the material on these lands would justify a person of ordinary prudence in risking his labor and means with a reasonable expectation of developing a valuable mine. United States v. New Jersey Zinc Co., 74 I.D. 191 (1967).

With regard to the claimants' contention that valuable deposits of sand and gravel occur on the claims, it is asserted on appeal that marketability was not presented as an issue in the second amended complaint. Appellants cannot claim surprise. The record indicates that the claimants at a prehearing conference a day prior to the hearing asserted that there are valuable deposits of sand and gravel on the claims. The record also shows that appellants were aware that the marketability of the sand and gravel would be an issue in the case. as one of their witnesses, James R. Miller, was a marketing consultant, who testified that he made a study of the market potential of sand and gravel. (Tr. 690-749.) In any event, as was stated in Coleman, supra, the marketability test is a logical complement to the prudent man rule in determining whether the requirements of a discovery have been met.

Mr. Nielson, a Government mining engineer, testified that he studied the sand and gravel situation in Trinity County, where the subject claims are located. (Tr. 957). He testified that sand and gravel in Trinity County is quite an abundant commodity. They have a very fine quality of gravel, the primary source lying along the Trinity River and its tributaries. Much gravel has been drived from old hydraulic mines that were worked. These mines added the quality of upgrading to it. Also gravel along the banks and bars of the Trinity River is of rather good qualty, by reason of having traveled many miles most of the softer constituents are missing. (Tr. 958.) He mentioned that in this general area a sand and gravel plant capable of supplying specification concrete aggregate is operating at Douglas ity and supplying the needs of the area. Farther to the north is a small plant which operated intermittently supplying local demand, but the plant is not adequate for the production of highway specification concrete aggregate. With regard to gravel from the Weaverville formation, he stated that as a general rule the Weaverville formation is both too dirty and too soft due to weathering to make concrete aggregate, although it could be used for sub-base and fill material. He also testified that the market is so limited that the two producers mentioned adequately supply it. He pointed out that the biggest handicap is the remoteness of some of the market requiring a long haul, as the places are so remote and small that they cannot support a plant of their own. (Tr. 959-962).

Mr. Miller, testifying for the contestees, stated that he did not examine the sand and gravel on the contested claims, but made a study of the market potential for sand and gravel in the State of California and in the United States, that he had talked with one sand and gravel producer in the area of the claim, and that he had studied all the available literature on the subject. He testified that there has been a market for sand and gravel in Trinity County since 1850, that there was a pronounced increase in that market in the last two decades, and that a peak year was 1957. He added that the increase was due to the development of highways and roads. He expressed the opinion that there was an existing market for gravel in July 1955, and there is a market at the present time. (Tr. 702). He explained that the existing market would involve primarily road use and then in the future at intermittent times a large temporary demand for other types of public works, construction, primarily dams, paving areas, improved Forest Service camps and this type of thing, including general construction use. (Tr. 707.)

The issue is whether the sand and gravel on the subject claims could be extracted, removed and marketed at a profit on or before July 23, 1955, the date on which Congress withdrew common varieties of sand and gravel from location under the mining laws, supra. The record contains no evidence that there was as of the critical date or since, a demand for the sand and gravel deposits on

the subject claims. The fact that there was general limited market for sand and gravel in the area which was supplied from existing sources does not constitute evidence of a demand for these particular deposits. Furthermore, the record is barren of any evidence that these claims were ever developed for sand and gravel. The lack of proof of sales of sand and gravel from the claims as of July 23, 1955, or since, although not decisive of the issue of marketability, suggests that certain factors must have been involved that prevented the sale; i.e., it is indicative that the materials on the claims could not have been extracted, removed, and marketed at a profit as of that date or since. United States v. Alfred N. Verrue, 75 I.D. 300 (1968).

It is argued on appeal that the contested claims contain impervious fill material which is suitable for earth dam construction purposes and therefore, the fill material "has some property giving it distinct and special value." There was general testimony to the effect that the Bureau of Reclamation had tested many places in the vicinity of Trinity River for impervious fill material, including some of the subject claims, for use in the construction of Trinity Dam. It was disclosed that fill material from sources closer than these claims was used in the construction of that dam. Materials used for fill purposes are not subject to location under the miing laws. United States v. William M. Hinde et al., A-30634 (July 9, 1968), and cases cited. The fact that there may have been temporary local demand for fill material with the property of

being impervious, does not make it locatable (Holman v. Utah, 41 L. D. 314 (1912) or make it other than a common variety of material. Even if such material was locatable, or is considered to be an uncommon variety, the requirements for a discovery have not been met in view of the lack of demand and lack of bona fides in development, as stated above.

We conclude, as did the Hearing Examiner, that the contestees have failed to meet the burden of proof upon them to show by a preponderance of the evidence that a valid discovery has been made on each and any of their claims.

Accordingly, the d cision appealed from is affirmed. 3/

[Information concerning right of appeal is omitted.].

/s/ Frances A Patton
Acting Chief, Office of
Appeals and Hearings

3/ Patent application Sacramento 049136, which included the subject claims, was closed out by a Bureau decision dated August 18, 1969, dismissing an apeal for failure to file a statement of reasons for the appeal within the extended period allowed for filing. As no appeal was taken from that decision, it has become final.

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1856

In the Supreme Court of the United States

OCTOBER TERM, 1977

HUMBOLDT PLACER MINING COMPANY, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-8) is reported at 549 F. 2d 622. The order of the district court (Pet. App. A-9 to A-10) is unreported. The decision of the Secretary of the Interior (Pet. App. A-10 to A-37) is reported at 8 IBLA 407. Subordinate Department of the Interior opinions are unreported and appear at Pet. App. A-39 to A-130.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1977. A timely petition for rehearing *en banc* was denied on March 28, 1977 (Pet. App. A-1). The petition for a writ of certiorari was filed on June 25, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly upheld a decision of the Secretary of the Interior as supported by substantial evidence, where the district court, in upholding that decision, had failed to render an opinion or give detailed reasons for its ruling.

STATEMENT

Petitioner filed this action in the United States District Court for the Eastern District of California to review a decision of the Secretary of the Interior that certain of its mining claims condemned by the United States were without compensable value.[1] Petitioner had asserted in the administrative proceedings that the claims had value both as a gold placer and as a gravel deposit (Pet. App. A-3). The Hearing Examiner concluded that the claims had no value on either ground (Pet. App. A-3 to A-6), and the Interior Board of Land Appeals upheld that decision (Pet. App. A-3, A-5 to A-7).

After reviewing the administrative record, the district court granted the Secretary's Motion for Summary Judgment and dismissed petitioner's complaint (Pet. App. A-9 to A-10). The court did not write an opinion or set forth in detail the reasons for its decision. The Court of Appeals for the Ninth Circuit affirmed. That court reviewed with particularity the evidence presented in the administrative proceedings and concluded that the Secretary's decision was supported by substantial evidence (Pet. App. A-3 to A-8).

ARGUMENT

Petitioner contends (Pet. 6-13) that the court of appeals should have required the district court to set forth the evidence on which it relied in granting summary

[1]This Court in *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, held that the Secretary of the Interior should rule in the first instance upon the validity of the mining claims.

judgment for the Secretary and that the Secretary's decision, on the record as a whole, is not supported by substantial evidence.

Both courts considered the administrative record as a whole and rejected petitioner's contention that the Secretary's decision was unsupported by substantial evidence (Pet. App. A-9 to A-10, A-5 to A-7). Those factual determinations were correct and do not warrant further review.

The failure of the district court to make specific findings or to write an opinion presents no issue meriting this Court's attention. Although the Tenth Circuit has recognized that specific findings by the district court in granting summary judgment facilitate "proper appellate review," *Nickol* v. *United States*, 501 F. 2d 1389, 1391, and has directed district courts within its jurisdiction to make such findings, *Nickol* v. *United States, supra*; *Heber Valley Milk Company* v. *Butz*, 503 F. 2d 96, it has taken such action in the exercise of its supervisory powers and not as a matter of constitutional or statutory interpretation. Indeed, the Tenth Circuit has conceded that courts of appeals "are in as advantageous a position as the district court to determine this question from the record," *Nickol* v. *United States, supra*, 501 F. 2d at 1392. Thus, although other courts of appeals may elect as a matter of policy to follow the Tenth Circuit practice,[2] there is no conflict among the circuits that this Court should resolve and no need for a uniform national rule.

In the present case, the court of appeals provided precisely the sort of review that petitioner contends was required at the district court level, evaluating the evi-

[2]The Ninth Circuit upon occasion has expressed a preference that such findings be made. *Multiple Use, Inc.* v. *Morton*, 504 F. 2d 448, 450.

dence in light of petitioner's contrary arguments. Under these circumstances, it would serve no purpose to return this case to the district court to do what the court of appeals already has done.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

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